中華民國仲裁協會

CAA Newsletter

Spring 2012

Published by the Chinese Arbitration Association, Taipei www.arbitration.org.tw

CAA to Push for Reforms to the Arbitration Act

The Arbitration Act of the Republic of China was passed in 1998 and was last amended in 2002. Since its promulgation, the Arbitration Act has been the cornerstone of Taiwanese arbitration and has contributed significantly to the rapid growth of the CAA and arbitration in Taiwan. However, with the passing of time, the Act is slowly becoming outdated and is in need of revisions.

One area of the Act that has drawn criticism in recent years is Article 19, which stipulates that "in the absence of an agreement on the procedural rules governing the arbitration, the tribunal... may adopt civil litigation procedure...." Following this provision, many arbitrators have incorporated rules and principles of civil procedure into the arbitral process, which are different from international arbitration practices. For example, some arbitrators have held that the arbitral proceedings may only be stopped twice and for no more than 4 months each time. But, in an arbitration, the parties should have the liberty to set the length of suspension, as long as they mutually agree.

As the national arbitral institution of Taiwan, the CAA is leading the charge to amend and improve the Arbitration Act. Starting in February of this year, a CAA study group has been meeting each month to discuss and prepare a draft Arbitration Act reform bill, which is scheduled to be completed and presented to the Legislature by the end of this year. The study group is headed by Dr. Chung-Sen Yang, who was one of the drafters of the current Arbitration Act. The other committee members are Mr. C.C. Lee, partner of Lee and Li Attorneys-at-Law, Ms. Lillian Chu, partner of Tsar and Tsai Attorneys-at-Law, Ms. Helena Chen, partner of Formosan Brothers Attorneys-at-Law, Prof. Cheng-Tsung Huang of National Chengchi University, and Prof. Chih-Chung Kao of Ming-chuang University Law School.

CAA and CIETAC Hold Joint Arbitration Workshop in Taipei

CAA and CIETAC successfully co-hosted the 2012 Cross-Strait Arbitration Workshop on March 16 and 17 at the CAA's Taipei office. The workshop was led by six arbitration experts from China, including: Judge Xiaoli Gao of the People's Highest Court, Ms. Wenyin Wang, Head of CIETAC Research and Study Committee, Mr. Maoyuan Zhu, Partner, Zhonglun Attorneys-at-Law, Dr. Genda Chang, Court of Execution, the People's Highest Court, Ms. Yuching Chang, Manager, Yuching Attorneys-at-Law, and Dr. Xibao Shen, Dean of Shanghai University, College of Law.

Participants of the 2012 CAA-CIETAC Joint Workshop

This year's program was divided into 7 sessions, including an introduction to CIETAC arbitration rules, PRC Arbitration Act and its judicial opinions, PRC Contract Law and lectures on joint-venture and dispute resolution of Taiwan-related proceedings, and recognition and enforcement of Cross-strait awards. At

the conclusion of the workshop, the participants were divided into groups to take part in a mock CIETAC arbitration hearing.

In all, 30 people participated in the workshop. At the end of the workshop, CAA Chairman Nigel N. T. Li and CIETAC Secretary-General Jianlong Yu presented a passing certificate to all participants who passed the course to mark the conclusion of another successful CAA-CIETAC joint training workshop.

CAA Holds Members' Meeting

The CAA held its annual Members' Meeting on December 27, 2011 at the Taipei International Convention Center to review Association's performance in 2011. Overall, 2011 was another successful year for the CAA, which saw it receiving over 150 cases and, among them, 18 were international disputes, i.e. disputes that involve one or more foreign companies or nationals. The meeting also spotlighted the notable CAA events and accomplishments in 2011, including the holding of the CAA's first ever business negotiation workshop, the 2011 Taipei International Arbitration Conference, and the promulgation of the CAA Financial Arbitration Rules.

The meeting also sets and outlines CAA's goals and activities for 2012. First, it will try to attract more domestic and international parties to resolve their disputes at the CAA. Furthermore, the CAA will also actively promote international arbitration in Taiwan and look for opportunities to work with other arbitral institutions to promote the use of arbitration in the Asia-Pacific region. Finally, the CAA will hold training courses and conferences in 2012, including but not limiting to mediators' and arbitrators' trainings and international conferences and workshops. The next Members' Meeting is expected to be held in the last month of 2012.

Chairman Nigel N. T. Li delivering remarks at the 2011 Members Meeting

CAA Holds Financial Arbitration Conference

The CAA launched its Financial Arbitration Rules in October of 2011. Since then, the CAA has been working diligently to promote and introduce the new Rules to in-house lawyers and officers of the major financial institutions of Taiwan. On March 12, 2012, the CAA invited the two drafters of the Rules, Mr. Terry Tu, partner of Formosan Brothers Attorneys-at-Law and Mr. Fong-Fu Chen, managing partner of Tatone Law Office, as well as Dr. Tu-Mu Kuo, Professor of Law of Fu Jen Catholic University Law School, and Ms. Angela Lin, partner of Lee and Li Attorneys-at-Law, to introduce and explicate the features of the new Rules to more than 100 participants.

From Left to Right: Dr. Tu-Mu Kuo, Mr. Yuan-Ran Lee, Mr. Fong-Fu Chen, and Ms. Angela Lin

The feedbacks from the participants are extremely positive. Most of them praised the cost-effectiveness of the new Rules and expressed interest in choosing arbitration to resolve their potential disputes. The English version of the Rules will be made available on the CAA's English website by the end of May.

When and How to Challenge an Arbitrator

by Dr Phillip Landolt, Landolt & Koch, Geneva, Switzerland [1]

Introduction

The question of when and how to challenge an arbitrator is one of almost unrivalled practical importance for parties and their counsel in international arbitration.

On the one hand, one is anxious to ensure that those wielding almost unconfined power to determine one's rights possess the qualities promised, in particular neutrality. As the French say, whatever the arbitrator is worth is the worth of the arbitration ("Tant vaut l'arbitre, tant vaut l'arbitrage").

On the other hand, the mere fact of a challenge risks causing bad feeling from that arbitrator towards the challenging party. Challenges are usually received by the arbitrator concerned as an affront to his or her integrity and good judgement. They also threaten to deprive the arbitrator of the prestige and excitement of acting in the case, and the financial remuneration for it. If the challenge does not succeed, the arbitrator will generally continue in the role, and decide the case. His or her bad feeling towards the party who made the challenge may consciously or unconsciously cause him or her to be less sympathetic to that party in procedural and even in substantive matters in the arbitration.

There is an additional risk for challenges by respondents. When respondents challenge there is always the concern that their real motive, or one of their real motives, is to delay the arbitration. Much has been written of late about the increasingly-deployed "guerilla tactic" of challenging arbitrators in an attempt to derail an arbitration. Especially in the modern climate of intense concern for "saving time and costs in arbitration", when a party is stigmatized as dilatory the tribunal's confidence in that party may be diminished even to the point that its prospects on the outcome may be affected.

Limit challenges to situations where there is a reasonable prospect of success

Because of the high risk of the challenge creating bad feeling towards the challenging party, almost without exception it is vital to limit challenges to situations where there is a reasonable prospect of success.

When contemplating a challenge, one should always remind oneself that only a small percentage of challenges succeed. In practice, those assessing challenges are inclined to accept that a person already constituted as an arbitrator meets the requirements of the role. Moreover, those requirements are in practice not absolute ones. Unlike judges, arbitrators are active in the business world, and moreover, unlike judges they are constantly on the look out for work. Furthermore, many arbitrators are in fact nominated or even appointed by a party, who will clearly be looking for someone sympathetic to its interests.

Those assessing challenges, such as arbitration institutions, know that excessive zeal in policing for potential bias would in effect result in a constriction in the pool of potential arbitrators, and a limitation on a party's right to nominate its own arbitrator. In practice, a certain quantity of potential arbitrator bias is tolerated as inevitable, and irreducible.

Point to a concrete precedent case

Because removal of arbitrators is the exception and not the norm, one gains crucial safety in making a challenge by invoking a particular concrete case which has been treated as a conflict situation justifying the removal of the arbitrator, and bringing one's own set of facts within the reasoning behind that case. This is why the IBA Guidelines on Conflicts of Interest contain concrete examples of conflicts situations. The following electronic sources are among those providing information about determinations of challenges: http://globalarbitrationreview.com, http://iareporter.com, http://ita.law.uvic.ca, http://www.kluwerarbitration.com, and http://www.transnational-dispute-management.com. One must of course attend to complications ensuing from differences in the standards of assessment which will quite frequently operate.

Obtain clarity on the basis of assessment

It may also be observed that there are important obstacles to securing a sufficient degree of certainty of the prospects of success in a challenge. Most importantly, in many cases the relevant standard of assessment for bias will not be entirely settled and transparent, and even if it is, it may be a complex determination, or a matter of impression. To reduce the uncertainty, it is necessary to study all available relevant material on the standard of assessment. In view of what are ordinarily short periods in which to make a challenge, this is no easy task.

---

[1] www.landoltandkoch.com

Take steps to limit the potential fallout of unsuccessful challenges

Wise counsel will also take measures to limit the potential adverse consequences of a failed challenge. The most important element in this is to take scrupulous care to protect the challenged arbitrator's reputation in every way possible consistent with the making of an effective challenge, and to take pains to ensure that the challenged arbitrator is aware that one is so concerned. One should resolutely resist any temptation to make the challenge so uncomfortable for the arbitrator that he or she is tempted to resign. In the international world in which arbitration operates, where intimate and sustained contacts are the exception rather than the rule, a spotless reputation is an arbitrator's lifeblood. In reflection of this, for example, Article 20 of the Code of Ethics of the Chinese Arbitration Taipei provides that "[w]hen the Ethics Committee is deliberating upon a rule violation, it should try to avoid damage to any party's reputation or interests."

Thus, within the confines of short periods in which to challenge, one should always consider the advantage of approaching the arbitrator in question first to present one's concerns, politely and succinctly, copying the other members of the tribunal and the other side of course, but otherwise keeping the matter as informal and confidential as possible. Where there is a choice between making a confidential challenge to an arbitration organization and to a public court, other things being equal, one should chose the confidential setting.

Crucially, where the standard of assessment allows, it is almost always advisable to argue for the appearance of bias rather than bias itself. This avoids a frontal attack on the arbitrator's integrity and judgement. In view of the fact that arbitrators who are removed will frequently not be paid for their work, it is also best to challenge as early as possible in an arbitration (there are a number of other reasons for this, such as avoiding preclusion).

One's behaviour subsequent to a failed challenge is also important. Except where material further information of bias subsequently emerges, one should be concerned to show that one unreservedly accepts the challenge decision, and be anxious to take every opportunity to manifest one's confidence in the arbitrator whom one has unsuccessfully challenged.

Up-and-Coming Events

April 18, 2012
BOT Conference II, Taipei, Taiwan

April 25, 2012
BOT Conference III, Taipei, Taiwan

May 8, 2012
Real Estate Arbitration Conference, Taipei, Taiwan

June 10-13, 2012
ICCA Conference, Singapore

June 15, 2012
Chartered Institute of Arbitrators Workshop, Taipei, Taiwan

September 3, 2012
Taipei International Arbitration Conference, Taipei, Taiwan

Standard Arbitration Clause

"All disputes, controversies, differences or claims arising out of, relating to or connecting with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration referred to the Chinese Arbitration Association, Taipei ("CAA, Taipei") in accordance with the Arbitration Law of the Republic of China and the Arbitration Rules of Chinese Arbitration Association, Taipei. The place of arbitration shall be in Taiwan. The award rendered by the Arbitrator(s) shall be final and binding upon parties concerned."

The Chinese Arbitration Association, Taipei ("CAA") is a not-for-profit organization based in Taipei, Taiwan, providing wide-range of dispute settlement administration services, including arbitration, mediation and other alternative dispute resolution proceedings. The Association is the leading arbitration institution in Taiwan and one of the important arbitration centers in Asia-Pacific, handling more than 200 domestic and international cases per year.

Chairman: Nigel N. T. Li
Secretary-General: Chih-Hsing Wang
Editor-in-Chief: Houchih Kuo
Editor: Ting Sun
Editorial Committee
Committee Members: David Wen-Tang Su, Angela Lin, Helena Chen, and Pi-Song Tsai

Contact Details
Taipei Main Office
Floor 14, 376 Ren-Ai Road, Section 4, Taipei, Taiwan 106
Tel: 886-2-2707-8672 Fax: 886-2-2707-8462
Email: service@arbitration.org.tw
http://www.arbitration.org.tw